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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-495

INVESTORS DIVERSIFIED SERVICES, INC., INVESTORS VARIABLE PAYMENT FUND, INC. and IDS NEW DIMENSIONS FUND, INC.,
Petitioners,

v.

JACOB SCHEIN and MARVIN H. SCHEIN,
Respondents.

INVESTORS DIVERSIFIED SERVICES, INC.,
Petitioner,

v.

ANTONE F. GREGORIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This brief is submitted on behalf of petitioners Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., in reply to the brief for respondents dated February 19, 1974 (hereafter cited as "R.Br.").

Contentions that Abstention and Certification are Identical

The respondents urge (R.Br. 13-31) that this would not be a proper case for abstention, and that therefore it is not an appropriate one for certification. They rely heavily on language in *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 234-35, 237-38 (1943), indicating that under *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), federal courts have an obligation to decide questions of state law in diversity cases, which can be avoided by abstention only where there are "exceptional circumstances."

What respondents fail to perceive is that classical abstention, as exemplified by *Meredith,* mandates the dismissal of the federal complaint and remits the parties to the State court. Under certification, the federal case remains pending while an authoritative answer to a State law question is obtained from the highest State court. Thus, it is clear that abstention is a much more drastic remedy than certification, which may entail only a short period of delay.*

This Court has previously recognized such a distinction between types of abstention even in situations not involving certification. In *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959), the action of a district court in staying a federal case pending an interpretation of a state law was upheld, while on the same day in *County of Alleghany* v. *Frank Mashuda Co.,* 360 U.S. 185 (1959), the Court disapproved an abstention by dismissal of a federal court complaint.

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* For example, a six-month period is noted in *Martinez* v. *Rodriguez,* 410 F.2d 729 (5th Cir. 1969), at 731, fn. 7. This short delay may be compared with the seventeen months which elapsed between Judge Tyler's opinion and the Second Circuit reversal.

Abstention in this case would be justified in the absence of a certification statute, we submit, but that is not the issue. The position of respondents that the same "exceptional circumstances" or "special circumstances" that might be necessary to support abstention must be present in order to justify certification (R.Br. 21, *et seq.*) in effect would render nugatory the action of Florida and other states in adopting certification procedures. The only criterion under the Florida statute is that the case involve determinative issues as to which "there are no clear controlling precedents in the decisions of the supreme court of this state" (Florida Annotated Statutes, § 25.031). While we believe that a policy question of Florida law is involved here, it is not a requisite of certification that this be the case.

The respondents rely on *Propper* v. *Clark,* 337 U.S. 472 (1949), as indicating that a federal court should not submit questions of state law to a state court in the absence of circumstances which would justify abstention (R.Br. 21-22). In that case, however, there was no clear and expeditious state procedure for obtaining a state determination by certification such as the Florida statutes and rules provide.

The respondents have made an attempt (R.Br. 16-17) to categorize the "special circumstances" in which abstention has been held justified. This is a fruitless exercise, however, since this case involves certification rather than abstention.

Respondents set up a straw man by complaining (R.Br. 24-25) that Florida has, by its certification statute, sought to take away their right to have their claims decided in federal court. This is not the thrust of the Florida statute. Under *Erie* v. *Tompkins,* federal claims based solely on state law, as in this case, must be determined in accordance with that law. There is no doubt that the federal courts in

diversity cases are required to follow the decisions, where they exist, of the appropriate state courts. Obviously, the ultimate arbiters of a correct determination of state law are state courts, and the purpose of the Florida and other certification statutes is to provide a means of obtaining correct determinations, without ousting the federal courts of jurisdiction.

The Matter of "Abuse of Discretion"

The respondents urge that "assuming arguendo" that the court of appeals had discretion to certify the question of law, there was no abuse of discretion in not doing so (R.Br. 32-34). The apparent negative implication of this argument, that the court of appeals had no power or right to certify, is clearly without merit, and even respondents do not clearly suggest otherwise. The applicable Florida rule permits certification by the court of appeals "upon its own motion" or upon an approved "suggestion or motion of any interested party" (Florida Appellate Rule 4.61 c). This Court itself has ordered certification on its own motion. *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960); *Aldrich* v. *Aldrich*, 375 U.S. 75 (1963); *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963). It is the position of these petitioners that in the circumstances of this case there was no discretion to fail to certify, or that, under these circumstances there was an abuse of discretion in such failure.

The primary basis of respondents' contention that there was no abuse of discretion is that petitioners did not request certification until after a decision adverse to them on the merits.* This is a reiterated theme of respondents (R.Br. pp. 9-10, 31-34, 35-36). It is of course true that petitioners did not seek certification until after a two-man

*Respondents' only other asserted basis is a repetition of the specious claim that certification requires the same "special circumstances" as abstention.

majority of the court of appeals had reversed the dismissal of the complaint in the district court by Judge Tyler. The practical explanation is obvious; the petitioners, defendants below, had prevailed, and had no reason to believe that the court of appeals would disregard the lack of Florida precedent and create a novel "Florida" cause of action. As noted above, this Court has ordered certification without a suggestion from any party, and here Judge Kaufman urged it in dissent. Certification was also specifically urged in the petition for rehearing filed by these petitioners.

As respondents indicate (R.Br. 34, note), Judge Kaufman's reference to the two-judge majority as having refused to utilize certification makes it clear that the matter probably was discussed. The suggestion that this supports a view that there was no abuse of discretion, however, is unwarranted. The situation here, actually, is one of an equal division among the federal judges who considered the matter on the merits in guessing what conclusion the Florida courts would reach concerning Florida law, with Judges Tyler and Kaufman reaching one conclusion, and Judges Waterman and Smith another. All agreed, however, that the cause of action asserted here is wholly unprecedented in Florida law and that there are no "clear controlling precedents" of the Florida Supreme Court.* Under these circumstances, we submit, it was at best an abuse of discretion not to obtain a definitive answer from the Florida Supreme Court.

The Question of Waiver

The final argument of respondents is similar if not identical to the one relating to abuse of discretion, and is that the petitioners waived their right to object to the failure to certify the question by arguing the merits and not re-

*Judges Waterman and Smith cited only one Florida case, *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927), which dealt with a real estate broker's breach of duty to his principal, and in no way foreshadowed the claim urged here.

questing certification (R.Br. 34-37). In support of this, respondents quote (R.Br. 35) a passage from *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), to the effect that a party who submits federal claims to a state court and loses cannot then start over in a federal court.

The *England* case, which respondents characterize as "a reverse situation," in fact provides a strong argument for certification. The case involved questions of both state law and federal law and was begun in a federal court, which abstained pending the outcome of a state court declaratory judgment action. In the state court the plaintiff argued both the state law issue and the federal issue, and both were decided adversely to plaintiff. Thereafter, when an effort was made to relitigate the federal question in the still-pending federal action, the district court dismissed the case. The opinion cited by respondents was on appeal from this dismissal. This Court, in the passage cited by respondents, announced that in the future litigants who submitted both federal and state claims to a state court would be deemed to have waived the right to have the former decided in federal court. In the *England* case itself, however, the Court did not hold there was a waiver, because the plaintiff had proceeded on the erroneous impression derived from a previous decision that both claims must be submitted to the state courts.

In a concurring opinion in *England*, Justice Douglas suggested that perhaps there should be a reconsideration of the entire abstention doctrine, which he said had resulted in great expense and delay for litigants. He noted the advantages of the certification procedure over abstention, and as indicated in our main brief (pp. 16-17), said that the use of certification should be encouraged (375 U.S. at 433-34). As we have said, this is an ideal case for such encouragement.

In the instant case, there is no question of federal law, although the majority in the court of appeals relied substantially on federal securities law cases (93a) and the policies underlying them, in guessing at Florida law by extending a New York state case beyond its holding, which was itself an unprecedented extension of state law. Federal court litigants in such a case as this one, where federal jurisdiction is based solely on diversity, are entitled (1) to have the state law question correctly determined in accordance with Florida law, and (2) to have fact questions determined in the federal court. Cf. the *England* case, *supra*, 375 U.S. at 415-17. The first right may be effectively protected by the procedure of certification. The fact that the certified question here would be based solely on the allegations of the complaint limits the function of the Florida Supreme Court in a way that protects the second right and eliminates the confusion and delay incident to situations like that in the *England* case.

CONCLUSION

For all the reasons stated in the main brief for these petitioners and in this brief, the decision of the Second Circuit majority should be reversed.

Respectfully submitted,

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